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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Under the Social Security Act, the Secretary of Health and Human Services may provide that benefits due a beneficiary who is a minor child or an incapacitated adult may be paid on his behalf to a relative or other person (a "representative payee"). Section 16 of the Social Security Disability Benefits Reform Act of 1984 requires some representative payees to make an annual accounting to the Secretary, but exempts from this requirement any representative payee who is the parent or spouse of the beneficiary and is living with the beneficiary, as well as any representative payee that is a federal or state institution in which the beneficiary resides. The question presented is whether these exemptions are unconstitutional, on the theory that the beneficiaries concerned have a procedural due process right to have their parent, spouse or institution submit an annual accounting to the Secretary.

PARTIES TO THE PROCEEDINGS

The named appellee, Jeanne A. Jordan, is the representative of a nationwide class of all recipients of benefits under Title II or Title XVI of the Social Security Act whose benefits have been paid to a representative payee at any time on or after six years prior to the filing of this action (App. 21a). Appellee Barbara Leeds was permitted to intervene as a plaintiff (App. 24a).

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The April 10, 1987 order of the district court denying the Secretary's motion for relief from judgment (App. 1a-5a)[1] is unreported. The prior orders of the district court (App. 8a-55a) are also unreported.

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[1] "App." refers to the separately bound consolidated appendix that we are filing to this jurisdictional statement and to our petition for a writ of certiorari in *Bowen* v. *Jordan*, in which we seek review of a related decision of the Tenth Circuit.

JURISDICTION

The order of the district court denying the Secretary's motion for relief from judgment and holding the relevant provisions of the Social Security Act unconstitutional was entered on April 10, 1987 (App. 1a). The notice of appeal was filed on May 8, 1987 (App. 6a-7a). On June 30, 1987, Justice White extended the time within which to docket the appeal to and including August 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATEMENT

This nationwide class action was filed in the United States District Court for the Western District of Oklahoma in 1979 to challenge procedures followed by the Secretary of Health and Human Services when he determines that a person's Social Security benefits will be paid on that person's behalf to a "representative payee." Such an arrangement is used where the beneficiary is a minor child or is an adult whose mental or physical condition prevents him from adequately managing his own affairs. There are approximately 5.3 million beneficiaries whose benefits are paid to representative payees. Approximately 3.0 million of those beneficiaries are minor children in the custody of a parent who serves as representative payee, and approximately 150,000 are adults who live with a spouse who serves as representative payee.

This case has a complex procedural history. On March 26, 1984, the district court held that the Due Process Clause requires *all* representative payees to furnish the Secretary with an annual accounting of their expenditures on the beneficiary's behalf. This direct appeal is taken from the district court's order of April 10, 1987, which denied the Secretary's mo-

tion for relief from that prior order. In the process of denying that motion, the district court held unconstitutional a provision in an intervening Act of Congress that exempts from mandatory annual accounting any representative payee who is (1) a coresident parent or spouse of the beneficiary or (2) a federal or state institution in which the beneficiary resides.

Before the intervening statute was enacted, the Secretary had taken an appeal to the Tenth Circuit from the district court's March 26, 1984, order. The Tenth Circuit, however, refused to consider the constitutionality of the intervening enactment and dismissed the Secretary's appeal. Accordingly, in addition to taking a direct appeal from the district court's April 10, 1987, order, the Solicitor General has authorized, and we will soon be filing, a petition for a writ of certiorari to review the Tenth Circuit's judgment. For convenience, and to avoid duplication, we shall state the complete procedural history of both aspects of the case here.

1. The authority to pay benefits to a "representative payee" is conferred upon the Secretary by Sections 205(j)(1) and 1631(a)(2)(A) of the Social Security Act, 42 U.S.C. (Supp. III) 405(j)(1) and 1383(a)(2)(A). The former section provides that Title II benefits may be certified for payment to a relative or other person for the beneficiary's "use and benefit," if the Secretary determines that the latter's interests would be served thereby. Similarly, 42 U.S.C. 1383(a)(2)(A) permits payment of Title XVI benefits to a spouse or other person "who is interested in or concerned with the welfare" of the beneficiary.

The Secretary has promulgated detailed regulations that govern whether payments should be made

to a representative payee and, if so, who should be selected as payee. 20 C.F.R. 404.2001 *et seq.*, 416.601 *et seq.* Benefits are routinely paid to a representative payee if the beneficiary is a minor child. In deciding whether to make payments to a representative payee on behalf of an adult, the Social Security Administration (SSA) considers such evidence as a court decision declaring the individual to be incompetent, medical evidence, or the statements of relatives or friends in a position to know the beneficiary's capabilities. 20 C.F.R. 404.2015, 416.615.

In selecting a particular representative payee, SSA considers such factors as the relationship of the person to the beneficiary, whether the person has custody of or legal authority over the beneficiary, and whether the person is in a position to know and look after the needs of the beneficiary. 20 C.F.R. 404.2020, 416.620. The regulations also specify a flexible order of preference to guide the selection of representative payees. 20 C.F.R. 404.2021, 416.621. For a beneficiary under age 18, the first preference is for a natural or adoptive parent (or a guardian) who has custody of the beneficiary. 20 C.F.R. 404.2021(b)(1), 416.621(b)(1). Succeeding preferences include a noncustodial parent who is contributing to the beneficiary's support. 20 C.F.R. 404.2021(b)(2)-(7), 416.621(b)(2)-(7). For a beneficiary aged 18 or older, the first preference is for a spouse, other relative, or legal guardian who has custody of the beneficiary or who demonstrates strong concern for his personal welfare. 20 C.F.R. 404.2021(a)(1), 416.621(a)(1). Succeeding preferences include a friend having custody and an institutional custodian. 20 C.F.R. 404.2021(a)(2)-(5), 416.621(a)(2)-(5).

The regulations specify information that must be submitted by a person who is a candidate to be a representative payee, as well as procedures by which the beneficiary may object to that person's designation. 20 C.F.R. 404.2025, 404.2030, 416.625, 416.630. Once the payee is designated, he is required to spend the Social Security payments "only for the use and benefit of the beneficiary" in a manner consistent with regulatory guidelines (20 C.F.R. 404.2035, 404.2040, 416.635, 416.640); to conserve and invest payments not needed for that purpose (20 C.F.R. 404.2045, 416.645); and to notify SSA of any change in his circumstances that would affect his performance as representative payee (20 C.F.R. 404.2035(d), 416.635(d)). The regulations also provide that SSA may select a new payee under certain circumstances. In particular, a new payee will be selected if SSA finds that the present payee has not used the payments in accordance with the prescribed guidelines; has not carried out other responsibilities under the regulations; or "[f]ails to cooperate, within a reasonable time, in providing evidence, accounting, or other information which [SSA] request[s]" (20 C.F.R. 404.2050, 416.650). The Act and implementing regulations make clear that the Secretary discharges his obligation to the beneficiary by making correct payment to the duly-selected representative payee; the representative payee, not SSA, is liable for any misuse of the funds thus paid. 42 U.S.C. 405(k); 20 C.F.R. 404.2041, 416.641.

2. a. This suit was filed in 1979 by appellee Jordan, an adult recipient of Title II disability benefits. Jordan had been found incapable of managing her own affairs, and her sister, Cathy Culp, had been designated as her representative payee. In late 1978,

a check for Jordan's retroactive benefits was sent to Culp, who was still listed as the representative payee, although Jordan apparently had moved out of Culp's house by that time. On November 13, 1978, Jordan's husband was designated as her new representative payee, and Jordan's monthly benefits thereafter were paid to him. App. 9a-10a, 23a-24a. In July 1979, at SSA's request, Culp submitted an accounting of her expenditures on Jordan's behalf. Factor Aff., Def. Reply Br. Exh. A, at 4-5 & Attachments 22, 23, 26. In 1980, Jordan received a check from SSA for the retroactive benefits previously paid to Culp (App. 11a).

The district court subsequently granted the motion of appellee Barbara Leeds to intervene (App. 24a). Leeds had been found to be disabled, and her attorney had recommended the appointment of Maude Miller, her roommate for seven years, as her representative payee. Leeds agreed to that proposal, and Miller accordingly received several benefit checks on Leeds' behalf. On April 27, 1977, however, Leeds applied to receive direct payment of her benefits, and SSA approved that application. At SSA's request, Miller then submitted an accounting, and SSA approved that accounting on August 4, 1977. Leeds subsequently alleged that Miller had misused $2,258 of the funds, but, after another review of the case, SSA found that there had been no misuse. App. 24a-25a; Factor Aff., Def. Reply Br. Exh. B, at 3-5 & Attachments 11-16.

b. On September 26, 1980, the district court certified a nationwide class, represented by Jordan, consisting of all recipients of Title II or Title XVI benefits in representative-payee status (App. 8a-22a). On March 17, 1983, the court held that the Due Process

Clause requires mandatory periodic accounting by all representative payees (*id.* at 23a-40a). The court acknowledged the results of an SSA study showing that misuse of funds was identified in only 0.5% of the cases in a sample of representative-payee cases. The court also acknowledged the Secretary's comprehensive procedures for selection of representative payees, as well as his discretion to order an accounting in appropriate circumstances (*id.* at 34a). After summarizing appellees' contrary arguments, however, the court asserted that the risk of erroneous deprivation of the beneficiaries' interest in the proper use of their benefits is great under existing procedures, and that the probable value of universal mandatory accounting is substantial (*id.* at 36a-37a, citing *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). The district court therefore ordered the Secretary to implement appropriate accounting procedures within one year (App. 37a).[2]

2. In response to the district court's March 1983 order, SSA formulated a plan under which all representative payees would be notified that they must maintain records regarding the use of payments, but an actual report would be required only of a random sample of 10% of all payees each year. App. 42a,

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[2] The district court rejected appellees' claim of a statutory and due process right to an administrative hearing and judicial review of SSA's determinations in response to allegations of possible misuse of benefits (App. 37a-40a). Appellees appealed that ruling, but the court of appeals affirmed (App. 63a-72a). See note 6, *infra*. The district court also rejected appellees' contention that they have a due process right to a hearing prior to SSA's selection of a representative payee (App. 26a-33a). Appellees did not appeal that ruling (see *id.* at 64a-65a). These questions are not involved here.

58a. The Secretary contended that this approach was appropriate because SSA could not annually review accounting forms submitted by all representative payees, and that the 10%-sample approach therefore would minimize needless paperwork for all concerned. On March 26, 1984, the district court rejected the Secretary's proposal and ordered the Secretary to institute universal annual accounting (App. 41a-43a).[3]

3. The Secretary filed a notice of appeal to the Tenth Circuit from the district court's March 26, 1984 order. Before that appeal was briefed and argued, however, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. Section 16 of that Act (98 Stat. 1809-1811) made several amendments to the statute's representative-payee provisions. These amendments, among other things, increased the criminal penalties for misuse of funds by representative payees (see 42 U.S.C. (Supp. III) 408, 1383a), and sought to ensure careful selection of such payees in the first instance (see 42 U.S.C. (Supp. III) 405 (j)(2), 1383(a)(2)(B)).

Of particular relevance here, Congress also directed the Secretary to establish a monitoring system under which representative payees "shall report not less often than annually with respect to the use of [Social Security] payments," with a sample of those reports

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[3] On July 2, 1984, the district court granted the Secretary's motion to amend the March 26, 1984, order to exclude from the annual accounting requirement all federal and state facilities for the mentally ill or retarded that serve as representative payees (App. 44a-47a). The court concluded that on-site inspections and other monitoring of those facilities would furnish adequate protection (*id.* at 47a).

to be reviewed to identify instances of possible misuse. 42 U.S.C. (Supp. III) 405(j)(3)(A), 1383(a)(2)(C)(i). However, Congress expressly *excluded* from this annual accounting requirement the vast bulk of representative payees, *i.e.*, those who are the parent or spouse of the beneficiary and live in the same household as the beneficiary. For those payees, the Secretary is required only to verify periodically that the beneficiary and payee continue to live together. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii). The amendments further provide that, notwithstanding this general conclusion, the Secretary may require a report at any time if he "has reason to believe" that the representative payee is misusing the payments. 42 U.S.C. (Supp. III) 405(j)(3)(E), 1383(a)(2)(C)(v).[4]

The legislative history of the 1984 Act makes clear that these exclusions from the annual accounting requirement were enacted because of Congress's specific disagreement with the district court's March 26, 1984, order in this case. The Senate Report explained that prior to 1978, all payees—except custodial parents and spouses, legal guardians, and state and federal institutions—had been required to make an annual accounting, but that the accounting program had been suspended as a work-saving measure between 1978 and 1984. S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984). The report then stated (*ibid.*):

> In March 1983, a Federal district court ordered the Social Security Administration (SSA) to institute a system of periodic mandatory payee accounting within 1 year. *Jordan* v. *Heckler*.

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[4] The 1984 Act also exempts federal and state institutions serving as payees from the annual accounting requirement. 42 U.S.C. (Supp. III) 405(j)(3)(C) and (D), 1383(a)(2)(C)(iii) and (iv).

> In March 1984, SSA implemented an accounting system under which a random sample of 10 percent of all payees are required to account annually. At the request of the plaintiff, the court subsequently revised its order in *Jordan* so as to require an annual accounting from all payees.

The report noted that the 1984 Act contained various provisions designed to improve representative-payee procedures, but concluded (*id.* at 29 (emphasis added)):

> At the same time, the Committee amendment recognizes that *it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships* (*parent and child or spouses living together*) absent some allegation or overt reason to suspect the possibility of misuse of funds.

The amendments giving effect to this Congressional intent were made effective as of October 9, 1984 (§ 16(d), 98 Stat. 1811).

4. After the enactment of the 1984 amendments, the Secretary sought in two different ways to have the courts in this case consider the effect of that intervening legislation.

a. First, the Secretary filed a motion with the district court for an "indicative ruling" and for relief from judgment under Fed. R. Civ. P. 60(b), contending that the new statutory procedures afforded a constitutionally adequate system of monitoring. The district court ruled on that motion in an order dated January 18, 1985 (App. 48a-55a). It there held that it was "without jurisdiction to rule on a motion for relief from judgment pursuant to Rule 60(b)" because the case was then pending on appeal to the Tenth Circuit (App. 48a; see *id.* at 51a, 55a).

The court went on to state, however, that it would "grant defendant's motion for an indicative ruling and advise the parties that were such a motion [for relief from judgment] presented, it would be denied" (App. 48a). The court recognized that "[i]mplicit in Congress' exception [in the 1984 Act] for spouses and parents who live in the same house is the assumption that a representative payee who is closely related to the beneficiary need not be monitored as closely as others" (*id.* at 53a n.2). The court nevertheless pointed out that it had "quite specifically ruled" that the Due Process Clause requires mandatory periodic accounting. The court then reaffirmed its view that such accounting (or its functional equivalent, such as on-site inspection of institutions) was required for *all* representative payees, notwithstanding Congress's contrary decision (*id.* at 54a).[5]

Because the district court stated in its January 18, 1985, order that it did not have jurisdiction to entertain a Rule 60(b) motion for relief from judgment, the Secretary did not take an appeal from that order insofar as it purported to give only an "indicative ruling."

b. The Secretary then sought to have the Tenth Circuit address the constitutionality of the 1984 Act in its consideration of the Secretary's pending appeal. In the March 26, 1984, order that was the subject of

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[5] The court's only response to Congress's determination that co-resident parents and spouses do not need to be monitored as closely as other payees was to point to the fact that appellee Jordan "challenged the propriety of her *sister's* actions while her sister acted as Jordan's representative payee" (App. 53a n.2 (emphasis added)). A sister, of course, is not excluded from the annual reporting requirement under the 1984 Act even if she lives with the beneficiary.

that appeal, the district court (1) had rejected the Secretary's proposal for reporting by a 10% sample of beneficiaries and (2) had ordered the Secretary to require annual reporting by *all* representative payees (App. 42a-43a). On appeal, the Secretary did not challenge the first aspect of the district court's ruling, since Congress in the 1984 Act had rejected the 10%-sample approach and had instead mandated accounting by all representative payees except those specifically excluded. The Secretary did challenge the second aspect of the district court's ruling, however, contending that the court of appeals was required to apply the intervening change in the law and thus to exclude the statutorily-specified persons from the universal accounting ordered by the district court (C.A. Br. 17, citing *Bradley* v. *Richmond School Board*, 416 U.S. 696, 714 (1974)). The Secretary accordingly informed the court (C.A. Br. 14): "Since there is now a statutorily-required accounting program, * * * the only issue on appeal now is whether Congress's decision to exempt certain payees from the accounting program satisfies the requirements of due process." The remainder of the Secretary's brief was devoted to a defense of the constitutionality of Congress's exemption of co-resident parents and spouses from the annual accounting requirement. C.A. Br. 17-28.

On January 5, 1987, the court of appeals dismissed the Secretary's appeal (App. 56a-62a). Although the district court order under review had required annual accounting by *all* representative payees, and although the Secretary's argument on appeal had defended the intervening Act of Congress that provided for annual accounting by *fewer than all* payees, the court of appeals asserted that the Secretary had "abandoned any

challenge to the order from which the appeal is taken" (*id.* at 61a). The court apparently was of the view that the Secretary could challenge the district court's order only by arguing that the 10%-sample approach he originally proposed was consistent with due process, even though that proposal had since been superseded by the 1984 Act (*id.* at 60a-61a).

The court of appeals also declined to consider the constitutionality of the 1984 Act, on the ground that the Secretary had not taken an appeal from the district court's January 18, 1985, order (App. 61a-62a). Although the district court had stated in that order that it was only granting an "indicative ruling" and that it was "without jurisdiction to rule on a motion for relief from judgment" (App. 48a), the court of appeals held that, under its prior decision in *Aune* v. *Reynders*, 344 F.2d 835 (10th Cir. 1965), the district court in fact *did have* jurisdiction to deny a Rule 60 (b) motion while the appeal was pending (App. 51a-62a). The court of appeals acknowledged that the situation here did not "comport precisely" with the circumstances in *Aune*, but it asserted that the "effect" of the district court's January 18, 1985, order was to deny the Secretary's motion for relief from judgment. And because the Secretary had not appealed that order, the court of appeals refused to pass on the constitutionality of the intervening Act of Congress. *Id.* at 62a.

5. Following the court of appeals' order dismissing the Secretary's appeal, the Secretary took two further steps in an effort to achieve full judicial consideration of the constitutionality of the 1984 Act.

a. First, the Secretary filed a petition for rehearing of the court of appeals' order dismissing the appeal. In that petition, the Secretary explained that

he had not "abandoned" his appeal from the district court's March 26, 1984, order, since his position on appeal was that the court of appeals should approve the *less-than-universal* accounting provided for under the 1984 Act rather than the *universal* accounting ordered by the district court (Reh'g Pet. 9-12). The Secretary also explained that his failure to appeal the district court's January 18, 1985, order was irrelevant (i) because the district court had held (however erroneously under *Aune*) that it did not have jurisdiction to deny a Rule 60(b) motion by the Secretary, and (ii) because the court of appeals was in any event required to consider the intervening change in the law wrought by the 1984 Act (Reh'g Pet. 7-9, 10). The court of appeals nevertheless denied rehearing on June 19, 1987 (App. 73a-74a). The Solicitor General has authorized the filing of a petition for a writ of certiorari, currently due on September 17, 1987, seeking review of the court of appeals' order dismissing the Secretary's appeal.

b. Second, since the court of appeals had made clear that the district court, on its view, *would* have jurisdiction to entertain a motion for relief from judgment, the Secretary filed a new motion seeking relief from the district court's March 26, 1984, order. In this way, the Secretary sought to assure *some* avenue for appellate consideration of the constitutionality of the 1984 Act—if not in the Tenth Circuit, then by way of direct appeal to this Court. On April 10, 1987, the district court denied the Secretary's motion (App. 1a-5a). It stated (*id.* at 4a-5a):

> The Court has reviewed the motion and the objections thereto of the plaintiffs and again finds that the Secretary is not entitled to the relief

> sought. The Court not only has engaged once in the analysis required by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), *see* Order of March 17, 1983, but also has already considered the legislative provisions cited by the Secretary and the need for protecting the due process rights of those beneficiaries for whom parents or spouses have been appointed representative payees. *See* Order of March 26, 1984, as amended July 2, 1984. Thus, the Court finds it unnecessary to readdress those arguments presented by the Secretary.

The instant direct appeal is taken from this order of the district court.

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. That holding is clearly incorrect. The procedural protections afforded by the Social Security Disability Benefits Reform Act of 1984 and implementing regulations are more than adequate to protect the interests of the beneficiaries whose representative payees are excluded from the annual reporting requirement under that Act—principally, beneficiaries for whom the payee is a parent or spouse living in the same household. The Act and regulations provide for careful scrutiny in the selection of a representative payee in the first instance, require a parent or spouse who is a representative payee to verify periodically that he continues to live with the beneficiary, and authorize the Secretary to insist upon an accounting if he has reason to believe that funds are being misused by the payee. More fundamentally, a misapplication of funds by a properly designated representative payee is not a deprivation

of property by the United States Government for purposes of the Due Process Clause. That Clause therefore furnishes no support for the district court's requirement that all such payees account for their expenditures or for the district court's resulting invalidation of the exemptions from mandatory accounting under the 1984 Act.

The holding below is of broad practical importance. Because this case is a nationwide class action, the district court's judgment will require the representative payees for more than three million beneficiaries to make an annual accounting that Congress determined was both unnecessary and inappropriate. Review by this Court therefore is plainly warranted.

1. The district court erred in a number of respects in concluding that the Due Process Clause furnishes a basis for invalidating the exemptions to mandatory annual accounting contained in the 1984 Act.

a. In the district court's view, the possibility that some unspecified number of representative payees might misapply funds gives rise to a due process right on the part of *all* beneficiaries in representative-payee status to have their payees make an annual accounting of expenditures to the Secretary (App. 37a). Contrary to the district court's apparent belief, however, a misapplication of funds by a representative payee is not a "deprivation" of property by the United States for purposes of the Due Process Clause. The several million representative payees who receive payments under the Social Security programs are not government actors when they then spend those funds on behalf of the beneficiary. The payees are private individuals who have voluntarily assumed the responsibility of looking after the affairs of other private individuals. In fact, for most

of the appellee class members at issue here, the representative payee is the closest member of the beneficiary's family (his parent or spouse) and lives in the same household with him. An erroneous expenditure or a misuse of funds by such a person surely is not the action of the government. This principle is expressed in the Social Security Act and implementing regulations, which explicitly provide that the correct payment of benefits to a representative payee on behalf of the beneficiary is a "complete satisfaction" of any right or claim to the payment and "completely discharge[s]" the Secretary's obligation to the beneficiary. 42 U.S.C. 405(k); 20 C.F.R. 404.2041, 416.641.[6]

Moreover, as this Court recently reaffirmed, "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *San Francisco Arts & Athletics* v. *U.S.O.C.*, No. 86-270 (June 25, 1987), slip op. 22-23, quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). There can be no plausible claim

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[6] The Tenth Circuit relied upon 42 U.S.C. 405(k) in an earlier decision in this case (App. 63a-72a), in which it rejected appellees' challenge to SSA's procedures for examining allegations of misuse of funds by a representative payee. The court of appeals recognized that such misuse might give rise to a state-law cause of action by the beneficiary against the payee or might prompt SSA to select a new payee. But it held that misuse would not give rise to any monetary claim against the Secretary that in turn would trigger a right to administrative or judicial review under 42 U.S.C. (& Supp. III) 405(b) and (g), since payment to the representative payee "discharges the Secretary from any further obligation" regarding the payment (App. 65a-66a, citing 42 U.S.C. 405(k)).

here that SSA provides "significant encouragement" or coercion to induce a representative payee to misspend funds. To the contrary, the Secretary has promulgated detailed guidelines to guard against such abuse. See 20 C.F.R. 404.2040, 416.640.

Nor is the Due Process Clause applicable merely because the government pays the funds, on the beneficiary's behalf, to his representative payee in the first instance. The government may pay monetary benefits to private parties "without assuming constitutional responsibility for their actions" (*San Francisco Arts & Athletics*, slip op. 20-21). See also *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-841 (1982); *Blum* v. *Yaretsky*, 457 U.S. at 1010-1011. Thus, for example, a parent's decision about how to spend Social Security benefits that have been paid to him for the benefit of his child "simply is not a governmental decision" (*San Francisco Arts & Athletics*, slip op. 23); see also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). For this reason, if a parent or other representative payee misapplies payments that he received from the government, the resulting loss of benefits is not a "deprivation" of property by the government for purposes of the Due Process Clause.

Because the conduct that the district court's universal accounting requirement is designed to forestall would not violate the Due Process Clause, the district court's judgment cannot be justified by reference to that Clause. The Constitution "does not require a remedy when there has been no 'deprivation' of a protected interest" (*Davidson* v. *Cannon*, No. 84-6479 (Jan. 21, 1986), slip op. 4).

b. Appellees likewise have no due process claim based on the actions that the government *does* take under the representative-payee program: the selec-

tion of the payee and the payment of benefits to that payee after his selection. The district court in fact rejected appellees' due process challenge to the procedures utilized by the Secretary in this respect, and appellees did not appeal that ruling (App. 26a-33a, 64a; see note 2, *supra*). Indeed, the procedures and standards applied by SSA demonstrate a special sensitivity to the care required in making those determinations. See pages 4-5, *supra*, and pages 22-23, *infra*. Those procedures and standards are especially unassailable as regards the class members at issue here—namely, beneficiaries whose representative payee is a parent or spouse living in the same household or is a federal or state residential institution. In all of those cases, the representative payee selected by the Secretary has custody of and a familial or legal relationship with the beneficiary, and therefore is especially likely to have an independent sense of responsibility for the beneficiary and his welfare.

For present purposes, then, it must be taken as a given that due process standards have been fully satisfied with respect to the Secretary's *selection* of representative payees for the class members at issue here. Nor is there any claim of a due process defect in the Secretary's procedures for *terminating* a representative payee's status when SSA is requested to do so or when it learns that the payee is not performing his responsibilities in the beneficiary's best interests.[7] Accordingly, at least in the absence of a request to terminate a representative payee or knowledge by SSA of derelictions by the payee that should lead it

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[7] SSA in fact terminated the status of the representative payees for Jordan and Leeds when it was requested to do so by the beneficiary or a substitute payee. See page 6, *supra*.

to do so sua sponte, SSA's continued payment of benefits to a representative payee who was properly designated in the first place fully discharges the Secretary's obligations under the Due Process Clause as well as the Social Security Act. Cf. *United States* v. *Dann*, 470 U.S. 39, 48-49 (1985); *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942).

This conclusion is compelled by *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986). There, the Court held that the Due Process Clause applies only to deliberate decisions by government officials to deprive a person of life, liberty, or property, and not to losses that result from a mere "lack of due care" by the government. Slip op. 4-6. Thus in the present context, even if the responsible SSA officials might fail in a given instance to exercise due care to discover or prevent an erroneous or improper expenditure by a representative payee, that failure would not constitute the sort of deliberate or abusive conduct by government officials to which the Due Process Clause is addressed. See also *Davidson* v. *Cannon*, slip op. 4. A fortiori, there is no basis in the Due Process Clause for the district court's imposition of a universal accounting requirement to prevent erroneous or improper expenditures by representative payees where a lack of due care on the part of SSA officials is neither alleged nor proven.[8]

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[8] Not only does the district court's mandatory accounting requirement lack support in law; it also lacks support in the record of the named plaintiffs in this case. SSA found no misuse of funds by the representative payee that had been appointed for either Jordan or Leeds. See page 6, *supra*. Moreover, SSA in fact requested an accounting of expenditures by the representative payees for Jordan and Leeds

c. Even if the Due Process Clause were thought to be implicated here, the procedures Congress and the Secretary have established are more than adequate to satisfy due process requirements. When Congress enacted the 1984 Act, it considered the precise question addressed by the district court: whether some or all representative payees should be required to make an annual accounting to the Secretary of their expenditures on behalf of the beneficiary. Congress concluded that an annual accounting should be required for some payees, but it specifically determined that "it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships (parent and child or spouses living together) absent some allegation or overt reason to suspect the possibility of misuse of funds." S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984). Congress therefore expressly exempted parents and spouses living with the beneficiary from the annual accounting requirement.

Congress reasonably could determine that the close bond between these representative payees and the beneficiaries who live with them makes it especially unlikely that incidents of misuse will occur. In other words, Congress concluded that for this category, the "risk of an erroneous deprivation" (*Mathews*

(*ibid.*), and it is thus unclear how those named plaintiffs were in a position to challenge the Secretary's failure to require accountings in other circumstances. Finally, the representative payees about whom Jordan and Leeds complained would be required to submit an annual accounting under the 1984 Act, since neither was the parent or spouse of the beneficiary.

v. *Eldridge*, 424 U.S. 319, 335 (1976)) was very small, and that the "probable value" of the additional "procedural safeguard[]" (*ibid.*) of an annual accounting was correspondingly minimal. And Congress properly could determine that the uncertain advantage of annual accounting did not warrant the "fiscal and administrative burdens" (*ibid.*) that would be entailed by requiring millions of representative payees to file, and SSA to process, the paperwork that would necessarily ensue. Indeed, Congress in 1984 properly recognized the intrusive nature of a requirement that an individual account to the government for funds he received and spent on behalf of his spouse or child who lives under the same roof.

At the same time, Congress did not altogether excuse these parents and spouses from all reporting responsibility. Rather, to ensure that the familial and custodial bonds that justify the exemption continue to exist, Congress provided that spouses and parents must verify periodically that they still live in the same household with the beneficiary. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii). Such periodic verification is a fully adequate substitute for the annual financial accounting that is required of more distant relatives and other payees. Moreover, the Secretary has the authority under the 1984 Act to require an accounting from any representative payee, including one who is exempted from routine annual accounting, if he "has reason to believe" that the payee is "misusing" the payments. 42 U.S.C. (Supp. III) 405(j)(3)(E), 1383(a)(2)(C)(v). This authority furnishes an important additional check against possible abuse.

This Court "has been willing to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)), and considerable deference therefore is due Congress's assessment of the need for particular procedural protections under a statutory benefits program. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 318-319 (1985); *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). The district court failed to accord the requisite deference to Congress's judgment here.

2. The district court's April 10, 1987, order refusing to vacate the universal annual accounting requirement it previously imposed is of broad practical significance in the administration of the Social Security programs. The effect of that order will be to generate potentially burdensome and needless paperwork for the representative payees who have been selected to receive and spend funds on behalf of more than three million beneficiaries. The order also imposes a substantial and unwarranted administrative burden on the Social Security Administration, which would be required to receive, process, and investigate millions of additional forms each year. Perhaps Congress in the future will conclude, on the basis of SSA's experience under the far more limited accounting program established by the 1984 Act, that accounting should be required of some additional representative payees. But the district court clearly erred in holding that the Due Process Clause inflexibly mandates the universal accounting enjoined by its April 10, 1987 order.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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